Supreme Court, U.S.
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No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS, INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

July 7, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Court of Appeals erred in holding, contrary to decisions of the First and Seventh Circuits, that the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, prohibits "reverse discrimination," *i.e.*, employer actions, practices, or policies that treat older workers more favorably than younger workers who are at least forty years old.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were plaintiffs-appellants in the court below and are respondents in this Court: John Alge, David Bayes, Gary Bish, Dan Brenamen, Lewis Browning, Anthony Ciminillo, Scott Danner, Hixey Deeble, Robert Dewald, Larry Dicke, Richard Dirmeyer, David Driggs, Ron Duran, Kenneth Emahiser, Donald Eversole, Earl Fast, Dennis Ferguson, Robert Feucht, William Fisher, Steven Flake, Vada Flinders, Robert Frye, Gregory Gebolys, Joseph Gibson, Robert Greenlee, Raymond Gourash, Steven Hammond, Nathan Heckathorn, David Hollon, Charles Huff, Gary Huff, Richard Huffman, Anthony King, Les Krotzer, Robert Kuhn, Gerald Lanning, David Laurence, William Legrant, Charles Lowery, Donald Mathias, Gregory Mayberry, Steven Mays, John McClellan, Danny McEowen, Stan Miller, James Munson, Vincent Napier, Robert Nye, Clayton Pitts, Dennis Powers, Eliseo Ramierz, John Rammel, James Reese, Leonard Risner, Patrick Roddy, Tom Saylor, John Schlosser, David Seibert, Marvin Shepherd, M.J. Shields, Doug Sipe, David Spires, Larry Stark, Kenny Stevens, Michael Strahm, Anthony Stubbs, Russ Theil, Thomas Tucker, Charles Wagner, Harley Wagner, John Wagner, Gregory Walters, Robert Waltermyer, Charles Wood, Michael Woodruff, Allan Young, Kyle Young, Rick Young, Robert Baker, Dean Becker, Gary Salyer, Daryl Beaupre, Terry Gibbs, Jon Cottrell, Terry Biddle, John Birkmeier, Margaret Boyd, Guy Burrows, Russell Clewley, Thomas Clifton, Daniel Cline, Jed Couts, James Culp, Sandra Daniel, Michael Dean, Dana DeCamp, Richard Diltz, Steven Freed, Daniel Geething, Patrick Goddard, Frank Guerrero, Alan Haunhurst, Robert Horning, Scott Hesse, Michael Hunsicker, Loren Hurless, Joanna Jacobs, Bobby Jordan, Bob Keiffer, Richard Kessler, Paul Kesner, Douglas

Kraepel, Gary Lamberjack, David Luchini, Lester Lyons, Joella Marks, Jeffrey Martin, Kenneth McCaslin, Robert McDonald, Robert Millirans, Jeffrey Monroe, Joseph Myers, Steven Myers, John Nekoranec, Wayne Nestor, Paul Niese, Mike Nino, Ronald Perrine, Charles Radloff, Mark Rex, Michael Rigsby, Bruce Rose, Dennis Schimmoeller, Michael Schultz, Sandy Snider, Larry Sutton, Cecil Turnbell, Ralph Wheeler, Robert White, Daniel Wilges, Robert Wilkins, Leonard Wilson, Richard Wright, Martin Zamudio, Emery Koszoru, Robert Beck, Donald Kime, David Pigga, Anthony Durkin, Richard Jackson, Thomas Kraycer, William Simson, Harry Baldan, Thomas Degrafenried, Leo Brunori, Delmar Weikel, Eugene Fisher, John Jerome, James Ferraro, Pete Borkowski, Kevin Parker, Michael Pisarski, Joseph Slakis, Boyd Smith, Vincent Cesari, Daniel Buranich, John Roszko, Gary Morcom, Stanley Homitz, Joseph Erzar, Dennis Kobierecki, John Wargo, Paul Debish, James Swartz, Peter Rosar, George Sansky, Patrick Rosemellia, Robert Clark, George Archibald, Thomas Earyes, Stanley Cominsky, Juleann Kurchin, James Clark, Keith Winkler, Ted Anaszeuski, John Manko, Ronald Kennedy, Thomas Babb, Roger Pool, Gary Rhodes, Ronald Mitchem, Jim Welly, David Dillon, Leonard Haaser, Ed Galan, David Puchta, Michael Lucius, Mario Diaz, Dennis Ryan and Michael Williams.

RULE 29.6 STATEMENT

Petitioner is a subsidiary of General Dynamics Corporation, a publicly traded company. No corporation owns more than 10 percent of the stock of General Dynamics Corporation.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, reported at 296 F.3d 466 (6th Cir. 2002), is reprinted at Pet. App. 1a-20a. The decision of the United States District Court for the Northern District of Ohio granting petitioner's motion to dismiss, reported at 98 F. Supp. 2d 846 (N.D. Ohio 2000), is reprinted at Pet. App. 21a-25a. The order of the United States Court of Appeals for the Sixth Circuit, denying rehearing *en banc*, is set forth at Pet. App. 26a-27a.

JURISDICTION

The district court had federal question jurisdiction over the respondents' claims under the Age Discrimination in Employment Act of 1967 ("ADEA" or "the Act") pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on July 22, 2002. Petitioner filed a timely petition for rehearing, which the court of appeals denied on September 19, 2002. Pet. App. 26a-27a. On December 6, 2002, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 17, 2003. *See* Application No. 02A468. The petition for a writ of certiorari was filed on January 16, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

The ADEA's statement of findings and purpose, § 2 of the Act, provides in pertinent part:

> (a) The Congress hereby finds and declares that –
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave . . . .
>
> * * *
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621.

The ADEA's nondiscrimination provision, § 4(a) of the Act, provides in pertinent part:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a).

The ADEA's age limitation, § 12(a) of the Act, provides:

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

29 U.S.C. § 631(a).

STATEMENT OF THE CASE

Congress enacted the ADEA to protect "older workers" against arbitrary discrimination arising out of invalid stereotypes about the impact of aging on workplace performance. ADEA § 2(a)(1)-(3), 29 U.S.C. § 621(a)(1)-(3). The Act combats the discriminatory effect of such stereotypical views, which Congress deemed responsible for the fact that unemployment was, "*relative to the younger* ages, high among *older workers.*" *Id.* § 2(a)(3), 29 U.S.C. § 621(a)(3) (emphasis added).

In the decision below, a badly fractured Sixth Circuit panel held that the ADEA forbids employers from treating older employees more favorably than their younger co-workers, as long as the younger co-workers are forty or older. That decision cannot be squared with the Act's language, structure, and express purpose, all of which compel the conclusion that the Act protects against discrimination because one is too old, not because one is too young. That conclusion also is supported by the Act's legislative history, this Court's decisions, and over thirty-five years of federal court ADEA jurisprudence. Moreover, allowing youth discrimination claims would impose serious and unwarranted new burdens, both on the older workers whose opportunities the Act was intended to secure and on the employers who seek to extend those opportunities without subjecting themselves to vexatious litigation.

A. Factual Background

General Dynamics Land Systems, Inc. ("General Dynamics") operates manufacturing plants at Lima, Ohio and Scranton, Pennsylvania, at which the employees are represented by the United Auto Workers ("UAW"). This litigation arises from two collective bargaining agreements negotiated between General Dynamics and UAW. The agreement in force until mid-1997 ("CBA1") provided full health benefits to all employees who retired with thirty years' seniority. In early 1997, General Dynamics and UAW negotiated a new collective bargaining agreement ("CBA2"), which ended the practice of providing health benefits to all retirees effective July 1, 1997. Instead, CBA2 offered retiree health benefits only to those employees who were at least fifty years old as of July 1, 1997. Pet. App. 3a.

Respondents are present and former employees of General Dynamics who were at least forty but not yet fifty years old on July 1, 1997. *Id.* The respondents are therefore protected by the prohibitions of the ADEA, which apply only to workers over forty. ADEA § 12(a), 29 U.S.C. § 631(a). Each of the respondents had qualified or could have potentially qualified for retiree health benefits under CBA1, but was ineligible for such benefits under CBA2. Pet. App. 3a.

On June 30, 1998, the EEOC wrote General Dynamics a letter opining that CBA2 "adversely affects those employees in the protected age group between the ages of forty through forty-nine by imposing a limitation on the level of benefits provided to them on the basis of their age" because they "would not be entitled to the same medical

benefits upon retirement as those employees who attained fifty years of age by that same date." JA16. Although the EEOC letter suggested that the EEOC might file suit if it could not reach an acceptable conciliation with General Dynamics, *id.*, the EEOC never filed suit.

B. Proceedings in the District Court

Respondents filed a putative class action against General Dynamics in the United States District Court for the Northern District of Ohio. Pet. App. 2a-3a, 21a. The complaint alleged that CBA2's limitation of retiree health benefits to employees fifty and older amounted to age discrimination, and they sought damages under the ADEA and state law. *Id.* at 22a.

The district court granted General Dynamics' motion to dismiss. *Id.* at 21a-25a. The court recognized that General Dynamics and the union lawfully could have "agree[d] to abrogate the retiree health insurance benefits program for all current employees in CBA2." *Id.* at 24a. The question, therefore, was whether the ADEA precluded General Dynamics from nevertheless being more generous to its oldest workers – those over fifty – if it did not provide the same benefit to younger workers who were at least forty. *Id.* The court rejected the notion that respondents could bring suit under the ADEA because they were too *young* to receive health benefits under CBA2. In doing so, the district court joined "[e]very federal court to have addressed the issue." *Id.*

C. Proceedings in the Court of Appeals

Respondents appealed, and the Sixth Circuit reversed in three separate opinions. Pet. App. 1a-20a. Relying on the purported "plain" language of the statute, Judge Ryan's opinion concluded that the only possible construction of the ADEA's operative provision, § 4(a)(1), bars basing employment decisions on the specific number of years a worker has lived, as long as the affected worker is older than forty. *Id.* at 6a-7a. The decision rested on the following "syllogism": because respondents were over forty and thus within "the protected class" of the ADEA, and because CBA2 defines eligibility for retiree benefits based on the specific number of years a worker has lived, respondents stated a claim under the ADEA. *Id.* at 11a.

Judge Ryan's opinion, while recognizing that respondents' claims were "unusual" in that "the plaintiffs were younger than the employees who were to receive health benefits upon retirement," Pet. App. 10a, did not analyze the ADEA's overall structure and purposes in concluding that the Act authorized such claims. Instead, the opinion dismissed as "hortatory, generalized language" the specific congressional findings and declarations of policy contained in § 2 of the ADEA, which make clear that Congress enacted the ADEA to prohibit discrimination against "*older* workers." *See id.* at 7a-9a. The opinion acknowledged that its conclusions ran contrary to decisions of the First and Seventh Circuits, *id.* at 6a-7a (citing *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.); *Hamilton v. Caterpillar, Inc.*, 966 F.2d 1226, 1228 (7th Cir. 1992)), and "the majority of courts to consider the question,"

but did "not find the reasoning undergirding these opinions persuasive." *Id.*

Judge Ryan's opinion repeatedly stated that it was relying entirely on the "plain" language of § 4(a)(1), which it declared was controlling over any more general provisions such as the congressional findings and purpose set forth in § 2. The opinion also noted that the Equal Employment Opportunity Commission ("EEOC") had promulgated a regulation which Judge Ryan believed had interpreted the ADEA to prohibit discrimination against relatively younger workers, as long as they were forty or over. *Id.* at 10a (citing 29 C.F.R. § 1625.2(a)).

Judge Cole wrote separately to state his concurrence with Judge Ryan's opinion, and to note his discomfort with the "counterintuitive" result reached by the majority and his "serious doubts" that the majority's holding accorded with Congress's intent in enacting the ADEA. Pet. App. 18a, 12a. Judge Cole also conceded that the majority's decision was in "tension" with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that a *prima facie* case of age discrimination under the Act includes a showing that the challenged employer action favored a person "substantially younger" than the plaintiff. Pet. App. at 16a-17a (citing *O'Connor*, 517 U.S. at 313).

Judge Williams dissented. Pet. App. 18a-20a. Noting that the panel majority stood alone in its construction of the Act to permit reverse discrimination suits, he concluded that "'the ADEA does not protect the young as well as the old, or even, we think, the younger *against* the

older.'" *Id.* at 18a-19a (quoting *Hamilton*, 966 F.2d at 1227) (quotation marks and citation omitted). He reasoned, as did the Seventh Circuit, that "age discrimination cannot be reversed as can sex or race discrimination because '[a]ge is not a distinction that arises at birth. Nor is age immutable.'" *Id.* at 19a (quoting *Hamilton*, 966 F.2d at 1227) (alteration in original). Although Judge Williams thought there might be "room for argument" over the meaning of § 4(a)(1) considered in isolation, he stated that such ambiguity could and should be resolved by referring to the statement of findings and purpose in § 2 of the ADEA, 29 U.S.C. § 621. *Id.* That provision's repeated references to "older workers" and "older persons," he wrote, make clear "Congress's intent to prohibit employers from discriminating against older workers, as opposed to younger ones." *Id.*

Judge Williams also pointed out that the majority's decision threatened to upset the benefits based on chronological age in early retirement programs that collective bargaining agreements across the country have established, in recognition of the fact that "a 50-year-old worker may need more protection or more benefits than a 40-year-old worker." *Id.* The inevitable result of the majority's contravention of this "common sense understanding" of benefits negotiation, he warned, would be that "bargaining for all workers, regardless of age, [will] suffer." *Id.*

SUMMARY OF ARGUMENT

The ADEA protects individuals from being discriminated against because they are too old, not because they are too young. The statute's operative language prohibits employment discrimination against an individual "because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). That text indisputably protects workers from adverse treatment based on their advanced age. But it cannot reasonably be read to extend to claims by younger workers that they have been denied employment benefits given to persons older than they are.

The Sixth Circuit committed a fundamental error in holding that the "plain language" of § 4(a)(1) authorizes workers forty or older to complain that they have been disfavored because they are too young. Even considered in isolation, the word "age" in § 4(a)(1) is plainly susceptible of the meaning "advanced years" or "old age," rather than "chronological age." Indeed, that is a common dictionary definition of the word "age." If "age" in § 4(a)(1) means "old age" rather than "chronological age," then the ADEA does not authorize "youth discrimination" claims of the kind at issue here. Thus, the "plain language" of § 4(a)(1) does not support the Sixth Circuit's reading of the ADEA.

To the contrary, when read in the context of the ADEA's other provisions, the prohibition of discrimination "because of . . . age" in § 4(a)(1) must be read to forbid only discrimination based on old age. *See Deal v. United States*, 508 U.S. 129, 131-32 (1993). That is the only fair reading of the statutory text taken as a whole and the only reading that makes sense as a practical matter. The ADEA's express

statement of findings and purpose, set forth in § 2 of the Act, 29 U.S.C. § 621, focuses exclusively on the disadvantages older employees face in the workplace relative to younger employees, and confirms that Congress's exclusive concern was eliminating the "inaccurate and stigmatizing stereotypes" of older workers as less productive and competent than their younger counterparts. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993). In light of Congress's express statement of findings and purpose in § 2, allowing "youth discrimination" claims of the kind endorsed by the Sixth Circuit would be a pointless and wholly unwarranted expansion of the ADEA's scope. The Sixth Circuit's approach would severely curtail employers' freedom of action and subject them to massive potential liability for a wide range of socially positive employment decisions that have never been thought controversial, while denying employees the right to bargain collectively for sensible benefit plans of the kind at issue here.

The remainder of the ADEA's structure similarly confirms that § 4(a)(1) prohibits only discrimination based on old age. Most importantly, only persons forty or older can claim the protections of the ADEA. ADEA § 12(a), 29 U.S.C. § 631(a). Had Congress intended to prohibit discrimination on the ground that an employee is too young as well as on the ground that the employee is too old, it would make no sense to limit the class of persons eligible to make such claims to those forty or older. Reinforcing the clear meaning of the statute's text and structure, the ADEA's legislative history also attests to the fact that Congress's sole concern in enacting the ADEA was protecting those forty and older from discrimination on the basis of unfair assumptions that they cannot perform as well as

comparatively younger workers. That is also the only reading consistent with this Court's precedent, *see O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), as well as decades of lower court precedent interpreting and applying the ADEA in a variety of contexts.

The EEOC interpretive guideline cited in Judge Ryan's opinion does not support a contrary result. *See* Pet. App. 10a (citing 29 C.F.R. § 1625.2(a)). On its face, that provision – which the EEOC has never enforced judicially – simply states the same rule this Court definitively established in *O'Connor*, *i.e.*, that an older worker can establish a prima facie case of discrimination even if replaced by a another worker within the protected class of those forty or older, so long as the younger worker is substantially younger. To the extent the EEOC intends the guideline to extend further and apply here, it should be rejected as fundamentally inconsistent with the text, structure and purposes of the ADEA, and patently unreasonable.

The Sixth Circuit's reading of the ADEA should also be rejected because it will generate serious real-world harms. The retiree health plan offered by General Dynamics in this case is identical in structure to hundreds of such plans that employers routinely offer. Declaring such plans to be presumptively unlawful would generate massive disruption, and would have the perverse consequence of prohibiting employers from offering such benefits to anyone, because employers simply cannot afford to offer them to all employees forty or older. The Sixth Circuit's reading would also subject employers to massive potential liability, as every employment decision could be attacked not only by workers claiming they were disfavored because they were too old but

also by workers forty or older claiming they were disfavored because they were too young.

Under remarkably similar circumstances, this Court recently rejected an interpretation of the Lanham Act that "would not only stretch the text, but . . . would be out of accord with the history and purpose of the [statute] and inconsistent with precedent" and would generate "serious practical problems." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 123 S. Ct. 2041, 2047, 2049 (2003). This Court should reject the Sixth Circuit's interpretation of the ADEA for the same reasons.

ARGUMENT

I. THE ADEA DOES NOT PROHIBIT PREFERENTIAL TREATMENT FOR OLDER WORKERS.

The ADEA bars only discrimination based on old age. When considered in light of Congress's express statement of findings and purpose in § 2 of the Act, 29 U.S.C. § 621, as well as the Act's overall structure, that is the only meaning that can reasonably be ascribed to the Act's prohibition of employment discrimination "because of . . . age." The legislative history likewise shows that Congress's sole concern in enacting the ADEA was preventing discrimination against individuals forty and older on the ground that an individual is too old. That is also the only reading of § 4(a)(1) that is consistent with this Court's decisions, as well as lower court precedent. The Sixth Circuit's contrary reading should thus be rejected.

A. The Statutory Text Does Not Authorize Workers Forty and Older to Complain That They Have Been Disfavored Because They Are Too Young.

As this Court has said many times, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal*, 508 U.S. at 132. The meaning of a word or phrase in a statute is not a matter of "definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). It is a "cardinal rule" that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citation omitted). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). *Accord Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001); *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n.5 (1998); *O'Gilvie v. United States*, 519 U.S. 79, 82-89 (1996); *Reno v. Koray*, 515 U.S. 50, 56 (1995); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990); *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987); *United States v. Morton*, 467 U.S. 822, 828 (1984); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08

(1961); *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850).

Although the Sixth Circuit paid lip service to these principles, it failed to apply them faithfully. Reading § 4(a)(1) in isolation, Judge Ryan's opinion concluded that the provision "clearly and unambiguously" forbade employers from favoring older workers over younger workers within what the opinion described as the "protected class." Pet. App. 6a. Focusing exclusively on the particular language in § 4(a)(1) extending the ADEA's coverage to "any individual" forty or older, Judge Ryan concluded that Congress's decision to protect "any individual" within that group necessarily meant that § 4(a)(1) protected such individuals from being treated less favorably on the basis of their relatively younger age as well as their relatively older age. *Id.* 6a-7a.[1] In his decisive concurrence, Judge Cole acknowledged "serious doubts," based on the overall "text and structure of the ADEA," that Congress intended to "allow persons ages forty and over to recover for so-called reverse age discrimination," but nevertheless agreed with Judge Ryan that the text of § 4(a)(1), standing alone,

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[1] As a matter of textual analysis, that reading is incorrect. It does not follow that Congress, by protecting "any individual" forty or older from discrimination "because of such individual's age," necessarily protected such individuals from being treated less favorably because they are too young. The text is plainly susceptible of being read as protecting "any individual" forty or older from being treated less favorably only on the ground that the individual is too old. That reading gives full effect to the statutory language because *every* individual forty or older receives the protection, and every individual forty or older is potentially at risk of being disfavored because of being too old. Indeed, as will be shown, that is the natural meaning of the statutory language and the meaning compelled by the ADEA read as a whole.

necessarily "prohibits age discrimination that favors older over younger protected employees." Pet. App. 12a.

In reaching this conclusion, the opinions of Judges Ryan and Cole erroneously assumed without analysis that, as used in the phrase "because of . . . age" in § 4(a)(1), the word "age" necessarily means "the number of years a person has been alive." To be sure, the word "age" considered in isolation could mean chronological age. But the term "age" can also mean the "quality or state of being old."[2] Indeed, that is a standard dictionary definition of the word. *See Webster's Third New International Dictionary* 40 (1993); *Random House Unabridged Dictionary* 37 (2d ed. 1993) ("advanced years; old age"); *American Heritage Dictionary of the English Language* 32 (4th ed. 2000) ("[t]he state of being old; old age"); *The Compact Oxford English Dictionary* 28 (2d ed. 1999) ("[t]he latter part of life, when the physical effects of protracted existence become apparent; old age"); *The New Lexicon Webster's Dictionary of the English Language* 15 (1987) ("old age"); *Encarta World English Dictionary* 29 (1999) ("[b]eing old . . . the state of being advanced in years").[3] *See also MCI Telecomm. Corp.*

[2] "Age" has many other possible meanings. For example, "age" can mean "era" (as in the Age of Reason) or a stage in life (as in Shakespeare's "seven ages of man"). *See also* William Shakespeare, *King Lear*, act 1, sc. 1 (using "age" to mean "old age") ("Know that we have divided/In three our Kingdom: and it is our fast intent/To shake all cares and business from our age; Conferring them on younger strengths, while we/Unburthen'd crawl toward death.").

[3] *See also American Heritage College Dictionary* 25 (3d ed. 1993) ("[t]he state of being old; old age"); *Random House Webster's College Dictionary* 24 (2d rev. ed. 2000) ("advanced years; old age").

v. American Tel. & Tel. Co., 512 U.S. 218, 225-26 (1994) (relying on several of these dictionaries).[4]

The Sixth Circuit ignored this common understanding of the term "age," and therefore failed to recognize that the text of § 4(a)(1) can naturally be read as forbidding only discrimination based on old age or advanced years, rather than chronological age. The Sixth Circuit's "plain language" rendering of § 4(a)(1) is thus insupportable even on its own inappropriately constricted terms.

Equally to the point, when the ADEA's prohibition of discrimination "because of . . . age" is read as this Court has stressed it must be read – in context – the meaning that must be given to the statutory text is one that bars discrimination based only on "old age" or "advanced years." As will be shown, the ADEA's express statement of findings and purpose, as well as its overall structure, confirm in the clearest terms that § 4(a)(1) bars discrimination against those forty or older on the ground that they are too old, and not that they are too young. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) (describing "[o]ld age" as the characteristic protected by the ADEA from discrimination).

[4] Such definitions of "age" were common at the time Congress passed the ADEA in 1967, "the most relevant time for determining a statutory term's meaning." *MCI*, 512 U.S. at 228. *See Webster's Third New International Dictionary* 40 (1961) ("an advanced stage of life, . . . the quality or state of being old"); *The Random House Dictionary of the English Language* 27 (1967) ("advanced years; old age").

1. The ADEA's Statement of Findings and Purpose Demonstrates That Section 4(a)(1) Prohibits Only Discrimination Against Older Workers and in Favor of Younger Workers.

Section 2 of the ADEA sets forth Congress's findings that "*older* workers find themselves disadvantaged in their efforts to retain employment," that "arbitrary age limits . . . may work to the disadvantage of *older* persons," and that "the incidence of unemployment . . . is, relative to the younger ages, high among *older* workers." 29 U.S.C. § 621(a)(1), (2) & (3) (emphasis added). None of these findings evinces the slightest concern for the purported disadvantages that workers who are forty and over face because they are *younger* than other workers.

In light of these findings, Congress declared that the "purpose" of the ADEA is to protect older workers from discrimination and to find ways to address problems that arise as workers get older:

> It is therefore the purpose of this chapter to promote employment of *older* persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

ADEA § 2(b), 29 U.S.C. § 621(b) (emphasis added). *See generally Morton*, 467 U.S. at 833 (stressing significance of

"underlying purpose" in ascertaining plain meaning of statutory term).

The problems identified in § 2 of the ADEA are hardships faced only by older workers as compared to younger workers. These problems relate to misperceptions that younger people perform more effectively in the workplace than do older people. As this Court has previously explained, Congress promulgated the ADEA because of "its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes" that are "unsupported by objective facts." *Hazen Paper*, 507 U.S. at 610-11. In reality, "'the performance of older workers was at least as good as that of younger workers.'" *Id.* (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)). Indeed, "[i]t is *the very essence of age discrimination* for an older employee to be fired because the employer believes that productivity and competence decline with *old age*." *Id.* at 610 (emphasis added).

Thus, the Sixth Circuit's reading of the ADEA would do nothing to advance the goals that Congress itself identified in the ADEA. What the Sixth Circuit's approach would do is work a fundamental change in the ADEA by endorsing an entirely new (and potentially massive) class of "youth discrimination" claims that Congress cannot reasonably be interpreted to have intended. Indeed, the Sixth Circuit's approach would unleash this sweeping new remedial scheme to remedy a "problem" that does not exist, and would disable employers from granting and (employees from seeking through collective bargaining) entirely sensible benefit plans of the kind at issue in this case. *See Jarecki*,

367 U.S. at 307 (rejecting construction that would give "unintended breadth" to statute).

The Sixth Circuit majority dismissed the findings and purpose set forth in § 2 of the ADEA as "hortatory, generalized language," and invoked the maxim that "the more direct and specific language of a statute ordinarily trumps the more generalized." Pet. App. 7a. This Court has, however, repeatedly made clear that when Congress chooses to include statements of findings and purposes in a statute itself, such statements "give[] content" to the Act's terms, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999), and provide "[p]articularly useful" interpretive guidance, *Dole*, 494 U.S. at 936. *See also Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002). The Sixth Circuit thus had it backwards in concluding that it could ignore the statement of findings and purpose set forth in § 2 of the ADEA, on the ground that the "plain language" of § 4(a)(1) dictated a different result. Section 2 provides particularly persuasive guidance as to what discrimination "because of . . . age" means in § 4(a)(1), and makes crystal clear that Congress intended to prohibit only discrimination based on old age.[5]

As is evident from the congressional findings, the ADEA's prohibition on discrimination "because of . . . age" addresses a different kind of problem, and operates in a

[5] In an analogous context, this Court relied on the statement of findings and purpose contained in the Americans With Disabilities Act in refusing to define "disability" so broadly that it would cover millions more people than the statutory findings and purposes indicated Congress intended. *See Toyota Motor Mfg.*, 534 U.S. at 197-98; *see also Sutton*, 527 U.S. at 484-87.

different manner, than does Title VII, which prohibits employment discrimination against any individual because of race or gender. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 279 (1976). The races and the sexes are equal under our Constitution, and decisions based on the immutable characteristics of race or sex are inherently suspect. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying heightened scrutiny to government race-based decisions under the Equal Protection Clause); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying heightened scrutiny to government gender-based decisions). Title VII therefore makes presumptively unlawful any adverse employment decision based on race or gender, irrespective of the race or gender of the person harmed or benefited. *See Santa Fe*, 427 U.S. at 280 ("uncontradicted legislative history" shows that Title VII was intended to prohibit discrimination against all races and both genders).

In contrast, the ADEA seeks to eradicate discrimination based on stereotypes about being too old, rather than discrimination based on an inherently suspect classification. *Kimel*, 528 U.S. at 83 (holding that government age-based decisions receive only rational basis scrutiny and "[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life span, will experience it"). The ADEA's statement of findings and purpose contains no suggestion that Congress believed that an employee's chronological age was an inherently suspect criterion, and that employers should therefore be forbidden from considering it once an employee is forty years old. Nor would Congress have had

any reason for drawing such a conclusion. An employee does not generally encounter employment problems simply because the employee is over forty and relatively younger than other relatively older employees. It is an employee's *old* age that leads to inaccurate stereotypes and discrimination. *Hazen Paper Co.*, 507 U.S. at 610. As the Seventh Circuit has noted, "Congress was concerned that older people were being cast aside on the basis of inaccurate stereotypes about their abilities. The young, like the non-handicapped, cannot argue that they are similarly victimized." *Hamilton*, 966 F.2d at 1228; *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir. 1988) ("[T]he Age Discrimination in Employment Act does not protect the young as well as the old, or even, we think, the younger *against* the older."). In short, there is "nothing to suggest that Congress believed age to be the equal of youth." *Hamilton*, 966 F.2d at 1227.

There are, moreover, many good reasons why employers or society generally might provide preferences to older workers. *See* Point II *infra*. An employer's decision to grant preferential treatment to an older worker on the basis of his advanced age thus "presents none of the risks that [the ADEA] is intended to address," and cannot be a basis for imposing liability under § 4(a)(1). *Morash*, 490 U.S. at 115.[6]

[6] Moreover, unlike the word "age" which can reasonably be read to mean "advanced years," no reasonable reading of "race" as used in Title VII could limit it to one particular majority or minority group, just as no reasonable reading of "sex" could limit it only to men or women.

2. The ADEA's Structure Further Demonstrates That Section 4(a)(1) Prohibits Only Discrimination Against Older Workers in Favor of Younger Workers.

The statutory structure provides further confirmation that § 4(a)(1) prohibits only discrimination based on old age.

Most strikingly, Congress's decision to limit the ADEA's protections to those forty or older, ADEA § 12(a), 29 U.S.C. § 631(a), refutes the notion that § 4(a)(1) authorizes employees to complain that they were disfavored because they were too young. As the Seventh Circuit has observed, if the ADEA were truly meant to prevent discrimination against workers based on their youth, "limiting the protected class to those 40 and above would make little sense." *Hamilton*, 966 F.2d at 1227.

Had Congress discerned a pattern of "inaccurate and stigmatizing stereotypes" about the relative inadequacies of younger rather than older workers, it could hardly have understood such a pattern to become evident only at age forty, and it would have had no reason to draw a line at age forty. The facts of this case illustrate why: under respondents' reading, a forty year old worker could challenge the benefit plan at issue here, but a thirty-nine year old worker could not, even though the thirty-nine year old is suffering exactly the same discrimination based on relative youth as the forty year old. The ADEA should not be interpreted to bring about this absurd result, particularly where (as here) the natural meaning of the text points in the opposite direction. *See United States v. X-Citement Video,*

Inc., 513 U.S. 64, 69 (1994); *Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993).

The defenses provided for in the ADEA (both as originally enacted and as amended over the years) reinforce the conclusion that § 4(a)(1) prohibits only discrimination based on old age. Section 4(f)(2) allows employers to treat older workers less favorably in order to comply with the terms of a bona fide seniority system. *See, e.g., Hiatt v. Union Pac. R.R. Co.*, 65 F.3d 838, 841 (10th Cir. 1995). Other provisions likewise protect employers from claims by *older* workers, carving out exceptions that expressly allow older workers to be disfavored. For example, the provision governing the employment of firefighters and law enforcement officers is a safe harbor that permits employers to hire only workers who are below a certain age and to require workers who attain a certain age to retire. *See* ADEA § 4(j), 29 U.S.C. § 623(j). Section § 4(f)(2)(B)(i), adopted in the wake of this Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), authorizes employers to provide lower benefit levels to older workers than to younger workers so long as the employer is spending at least as much on the older workers' benefits as the employer spends on benefits for younger workers. 29 U.S.C. § 623(f)(2)(B)(i). Similarly, the minimum age exception in § 4(l)(1)(A) – which was also adopted in the wake of *Betts* – clarifies that a pension benefit plan providing for the attainment of a minimum age as a condition of eligibility for normal or early retirement does not presumptively discriminate against older workers.[7]

[7] This provision responded to pre-*Betts* case law indicating that early retirement plans could be challenged as presumptively discriminatory against older workers on the ground that such plans necessarily coerced workers into retiring before they were ready or were a sign that employees above the designated retirement age were not welcome. *See generally Karlen*, 837 F.2d at 317 (stating that an older worker may "fear[] he will be discriminated against on account of his age if he does not [take early retirement]," or may "refuse[] to take early retirement" and then be "discriminated against on account of his age").

None of these provisions even remotely suggests that Congress contemplated "youth discrimination" suits of the kind at issue here.

Thus, when § 4(a)(1)'s prohibition of discrimination "because of . . . age" is considered in its proper context, the only reasonable meaning that can be ascribed to the statute is that it protects individuals forty and older from being discriminated against only on the ground that they are too old, and not that they are too young. This Court therefore need look no further than the text and structure of the ADEA to reverse the decision below.

B. The ADEA'S Legislative History Confirms That Congress Intended to Prohibit Only Discrimination Based on Old Age.

Legislative history confirms what the ADEA's text and structure make plain: § 4(a)(1) does not entitle an employee forty or older to sue where older employees receive more favorable benefits.

The ADEA had its origins in a Labor Department report, commissioned by Congress, that concluded that older workers faced significant employment disadvantages because of discrimination in the job market. *Report of the Secretary of Labor, The Older American Worker: Age*

Discrimination in Employment (1965). The report listed multiple forms of "Discrimination in Employment Because of Age," including explicit maximum age limits in hiring, employer perceptions about the health and abilities of older workers, obsolescence of job skills, employers' preference for promoting from within (thereby limiting outside hiring to low-level positions), and higher pension costs. *Id.* at 5-17. All of these forms of discrimination disfavor workers for being too old, not too young.

Similarly, the administration's message accompanying its proposed legislation focused on the plight of older workers, including involuntary retirement caused by half of all jobs being "barred to applicants over 55," and a quarter being "closed to applicants over 45." *Special Message to the Congress Proposing Programs for Older Americans*, 1 Pub. Papers 32, 37 (1967). At no point did the administration express concern about discrimination against workers who were forty and over based on the relative youth of those workers. To the contrary, the Labor Department's report commended employers who had an "active policy of recruiting older persons," noting that such employers "praised them for performance and dependability." *Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment* 9 (1965).

This exclusive focus on protecting older workers is also evident throughout every hearing and floor debate during the bill's consideration. Committees of both houses heard extensive testimony relating to the hardships that being old places on older Americans and the factors interfering with their full participation in the workforce. The concern throughout those hearings related to the same factors set

forth in the Secretary of Labor's report: maximum age limits for hiring, involuntary retirement ages, and employers' preconceptions about the effectiveness of older workers. *See, e.g., Age Discrimination in Employment: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare*, 90th Cong. 36-39, 85, 111, 146, 171 (1967); *Age Discrimination in Employment: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong. 6-9, 49, 56, 61 (1967). The committees in large part replicated the Labor Department's findings, which were ultimately incorporated into the ADEA's "Congressional statement of findings and purpose." ADEA § 2(a), 29 U.S.C. § 621(a).

If an added goal of the ADEA beyond its stated "purpose . . . to promote the employment of older persons," ADEA § 2(b), 29 U.S.C. § 621(b), was to prevent discrimination on the basis of youth, that purpose was conspicuously absent from the contemporaneous justifications for the legislation given by Congress and the administration. Significantly, the Senate and House Committee Reports, both of which identify the "employment of older workers" as the purpose of the bill, *see* H.R. Rep. No. 90-805, at 1 (1967); S. Rep. No. 90-723, at 1 (1967), show no intent to prohibit employers from treating older workers more favorably than younger workers. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (holding that Committee Reports on a bill are "the authoritative source for finding the Legislature's intent").[8]

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[8] In the volumes of speeches, testimony, and reports taken by both houses, the notion that the ADEA could protect older workers from being discriminated against for being too young was raised only once. During the Senate floor debate, Senator Yarborough indicated that he

The legislative history of the subsequently-enacted Older Worker Benefits Protection Act ("OWBPA"), confirms that the ADEA has never prohibited more favorable treatment of older workers. As explained above, § 4(f)(2)(B) permits an employer to provide less benefits to older workers, as long as the cost incurred by the employer on behalf of the older worker is "no less than" that incurred on behalf of the younger worker. 29 U.S.C. § 623(f)(2)(B). When asked by a Member of Congress whether the "no less than" language allowed one to "discriminate on behalf of older workers," then-EEOC General Counsel Charles A. Shanor, answered "That is correct." And Vice Chairman R. Gaull Silberman immediately volunteered, "That has always been the case." *Age Discrimination in Employee Benefit Plans: The Impact of the Betts Decision, Joint Hearing before the Select House Comm. on Aging and the Subcomm. on Employment Opportunities and Labor-Management Relations of the Comm. on Education and Labor*, 101st Cong. 77 (Sept. 21, 1989).[9]

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understood the law to have that effect. Cong. Rec. S15896 (Nov. 6, 1967) (stating belief that ADEA prohibits age discrimination "whichever way" the decision is made). But this isolated comment was not adopted by the Senate Committee Report explaining the bill's provisions, and therefore should be given no authoritative weight. This Court "eschew[s] reliance on the passing comments of one Member, and casual statements from the floor debates." *Garcia*, 469 U.S. at 76 (citation omitted). Committee reports are "'more authoritative' than comments from the floor." *Id.*

[9] Similarly, the American Association of Retired Persons, in written responses to questions made part of the Senate report on the OWBPA, clarified that "spending less for a benefit for a younger worker would not violate the [OWBPA]," and that "'reverse discrimination'

C. This Court's Decision in *O'Connor v. Coin Caterers Corporation* Further Confirms That the ADEA Prohibits Only Discrimination Based on Old Age.

The Sixth Circuit's reading of § 4(a)(1) is also at odds with this Court's decision in *O'Connor v. Coin Caterers Corp.*, 517 U.S. 308 (1996). In that case, the Court held that to establish a prima facie case of age discrimination, a plaintiff must show that he was treated less favorably than a "substantially younger" worker. *O'Connor*, 517 U.S. at 313. An ADEA plaintiff obviously cannot make such a showing if he was treated less favorably than an *older* worker.

O'Connor unanimously held that the ADEA "bans discrimination against employees because of their age," not "because they are aged 40 or older." 517 U.S. at 312. The question in that case was whether a plaintiff alleging that he was discharged in violation of the ADEA was required to show that he was replaced by someone outside the protected age group (forty and older) to make out a prima facie case of discrimination. *Id.* at 309. This Court rejected that requirement, holding that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." *Id.* at 313. The Court derived its "substantially

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cases have never been successful or seriously contemplated under the ADEA." *Older Workers Benefit Protection Act: Joint Hearing before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources and the Special Comm. on Aging*, 101st Cong. 186-87 (Sept. 27, 1989).

younger" test from the objectives of the statute, expressly formulating a prima facie case that would be a proxy for the discrimination that the Act forbids, *i.e.*, discrimination against older workers based on their relatively advanced age. *Id.* at 311-12 (holding "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption'") (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981)).

To interpret the Act as protecting all workers forty and older from all forms of age-related preferential treatment for all other employees, would be to conflate discrimination against older workers with "40 or over" discrimination – precisely the error condemned in *O'Connor*. *Id.* at 312. A claim under the ADEA depends on the relative ages of the individual plaintiff(s) and the preferred employee(s) (who must be substantially *younger*), not on membership in the protected class. The Sixth Circuit thus misread the statute by interpreting § 12 as defining the meaning of "individual" for purposes of the prohibition against age discrimination in § 4. Pet. App. 6a. As *O'Connor* makes clear, § 12 merely establishes the age limit for eligibility for ADEA protection. It cannot be read in conjunction with § 4 to define a class of "individuals" who are automatically entitled to equal treatment simply because they are forty and over. Thus, the Sixth Circuit's decision cannot be squared with this Court's decision in *O'Connor* and should be rejected for that reason, as well.

D. The Sixth Circuit's Interpretation of the ADEA Is Irreconcilable with Thirty-Five Years of Precedent.

In view of the clarity of Congress's meaning in § 4(a)(1) and the ADEA generally, it is not surprising that, apart from the Sixth Circuit in this case, virtually every federal court to consider the question has held that the ADEA does not allow suits based on *youth* discrimination, even by individuals forty and older. *See Hamilton*, 966 F.2d at 1227 (holding that the ADEA "does not protect the young as well as the old, or even . . . the younger against the older") (quotation marks and citation omitted); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (Breyer, J.) (noting that ADEA "does not forbid treating older persons *more* generously than others"); *Lawrence v. Town of Irondequoit*, 246 F. Supp. 2d 150, 161 (W.D.N.Y. 2002) (rejecting ADEA claim arising from more favorable treatment of older employees); *Dittman v. General Motors Corp.*, 941 F. Supp. 284, 287 (D. Conn. 1996) (adopting reasoning of *Hamilton* and noting that "ADEA does not bar discrimination against the young in favor of the old"), *aff'd*, 116 F.3d 465 (2d Cir. 1997) (unpublished table decision); *Parker v. Wakelin*, 882 F. Supp. 1131, 1140-41 (D. Me. 1995) ("The ADEA has never been construed to permit younger persons to claim discrimination against them in favor of older persons. Indeed, the existence of a minimum age requirement suggests that it was only discrimination *in favor of* younger individuals that the law is designed to prohibit."); *Wehrly v. American Motors Sales Corp.*, 678 F. Supp. 1366, 1380-83 (N.D. Ind. 1988) ("It would certainly be an anomaly if an employer was held liable under the Age Discrimination in Employment Act for failing to offer special early retirement

to an employee who was too young to qualify. Such a result would not serve the purpose of the Act, would make little sense, and would find no support in the case law."); *see also Stone v. Travelers Corp.*, 58 F.3d 434, 437 (9th Cir. 1995) (noting district court's adherence to *Hamilton*).[10]

But the incongruity of the Sixth Circuit's approach runs far deeper. Much of the doctrine developed in the federal courts setting forth the proof and defenses of ADEA violations would make little sense if the Sixth Circuit's reading of § 4(a)(1) were adopted. That the Sixth Circuit's interpretation cuts so sharply against the grain of this precedent counts powerfully against it. *See Dastar*, 123 S. Ct. at 2047.

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[10] The Sixth Circuit cited two cases as contrary authority – *Rannels v. Hargrove*, 731 F. Supp. 1214, 1220-21 (E.D. Pa. 1990); *Mississippi Power and Light Co. v. Local Union Nos. 605 and 985, Int'l Bhd. of Elec. Workers*, 945 F. Supp. 980 (S.D. Miss. 1996), *aff'd*, 105 F.3d 551 (5th Cir. 1996) (unpublished table decision). Neither is apposite. *Rannels* did not involve the ADEA at all, but instead concerned the Age Discrimination Act (ADA). The ADA was not limited to workers over the age of forty, and the district court's reasoning in that case has no bearing on whether the ADEA, which is specifically targeted at older workers, supports "reverse age discrimination" claims. *See* 731 F. Supp. at 1220 (noting that ADA "nowhere contains any limitations or exclusions directed towards any age-based group"). *Mississippi Power and Light* involved claims that the employer's policy discriminated against two classes of workers – those too old and those too young to obtain the benefit – and that case therefore does not directly address whether medical benefits may be unlawfully discriminatory solely because they are unavailable to workers younger than the minimum qualifying age. *See* 945 F. Supp. at 985 (noting policy disfavored workers under 60 and over 65). To the extent that decision supports the Sixth Circuit's decision, it is the only case that does so.

The kinds of inferences and presumptions that courts have approved in ADEA cases are uniformly premised on the understanding that the ADEA protects workers from being discriminated against on the ground that they are too old. None presupposes that workers forty and older may bring "youth discrimination" claims. For example, in cases of layoffs and reductions in force – one of the most common contexts in which ADEA claims arise – the courts look to the overall before-and-after picture of the affected workforce to determine if layoff criteria were in fact discriminatory against older workers.[11] That being so, an employer's showing that he or she retained at least a proportionate number of older workers during layoffs militates against discrimination claims by older workers in this context.[12] Under the Sixth Circuit's reading, however, retaining older workers during a layoff would constitute "smoking gun"

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[11] *See, e.g., Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245 (7th Cir. 1992) (reversing summary judgment in employer's favor where employer laid off 10 of 27 older employees but only one of 25 younger employees as part of reduction-in-force plan); *Hebert v. Mohawk Rubber Co.*, 872 F.2d 1104, 1110-11 (1st Cir. 1989) (holding in layoff case that plaintiff need not prove replacement by a younger worker, but rather that "younger persons were retained in the same position"); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 642-43 (5th Cir. 1985) (stating that employee could establish prima facie case of discrimination through "circumstantial evidence that younger employees were more favorably treated than older employees" in a reduction-in-force plan).

[12] *See, e.g., EEOC v. Clay Printing Co.*, 955 F.2d 936, 939-40, 943 (4th Cir. 1992) (affirming summary judgment for employer in age discrimination layoff case where average age of employees went up as a result of layoffs); *Goetz v. Farm Credit Servs.*, 927 F.2d 398, 405-06 (8th Cir. 1991) (affirming summary judgment for employer where average age of workforce remained same after layoffs).

evidence establishing a separate ADEA violation with respect to a different class of plaintiffs – those forty or over who were let go. *See, e.g.*, *Stokes v. Westinghouse Savannah River Co.*, 206 F.3d 420, 426 (4th Cir. 2000).

Similarly, the age of the decisionmaker is routinely held to be relevant to whether an inference of discrimination can permissibly be established from an adverse employment decision. If the decisionmaker is forty or older, that fact tends to rebut an inference of discrimination. No case law suggests that an employer can rebut a claim of discrimination by showing that the decisionmaker, like the plaintiffs here, was younger than the employees subject to allegedly adverse treatment.[13]

In this regard, it is no accident that the Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.* concluded that discriminatory intent could be inferred only when an employer passed over a qualified person forty or older in favor of someone "substantially younger." Prior to that decision, the only disagreement among the lower courts was whether the younger person also needed to be outside the protected class.[14] If the Act allowed claims by younger

[13] *See, e.g.*, *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) ("[Plaintiff] faces a difficult burden here, because all of the primary players behind his termination . . . were well over age forty and within the class of persons protected by the ADEA.").

[14] *Compare Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1335 n.2 (1st Cir. 1988) (prima facie case of age discrimination under the ADEA does not require that replacement be outside of protected class); *Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1374 (2d Cir. 1989) (noting same in dicta); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 792 (3d Cir. 1985) (replacement by worker outside of protected

workers as well as by older ones, these inferences would have no persuasive value, as they would have no "logical connection" to proving or disproving the discrimination forbidden by the Act. *See O'Connor*, 517 U.S. at 311.

E. Section 4(f)(2)(B)(i) of the ADEA Also Forecloses Respondents' Claims.

Respondents' claims, and the Sixth Circuit's holding that they may proceed, are also irreconcilable with § 4(f)(2)(B)(i) of the ADEA, 29 U.S.C. § 623(f)(2)(B)(i). That provision presupposes that an employer may treat older workers more favorably than younger workers, and makes clear that an employer does not violate the ADEA by doing so.

Under § 4(f)(2)(B)(i), an employer may spend as much as it likes on benefits for older workers, as long as the costs it incurs are "no less than [the costs] . . . incurred on behalf of a younger worker." 29 U.S.C. § 623(f)(2)(B)(i). The provision was added to the ADEA (in the wake of this Court's decision in *Betts*) to provide employers with a defense against discrimination claims brought by older

class not element of prima facie case); *Kralman v. Illinois Dep't of Veterans' Affairs*, 23 F.3d 150, 155 (7th Cir. 1994) (same); *Rinehart v. City of Independence*, 35 F.3d 1263, 1265 (8th Cir. 1994) (same); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988) (same); *Corbin v. Southland Int'l Trucks*, 25 F.3d 1545, 1549 (11th Cir. 1994) (same); *with Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993) (element of prima facie case is that replacement come from outside protected class); *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir. 1977) (same); *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 379 (6th Cir. 1993) (same).

workers claiming that they had received less generous benefits than comparatively younger workers. It provides that employers have acted lawfully so long as they spend at least as much on the benefits provided older workers as they spend on benefits for comparatively younger workers.

Critically for present purposes, the provision does not mandate equal treatment of all employees forty or older, either with respect to benefit levels or the amount an employer spends for benefits. What it requires is that the employer spend "no less" on the older worker than the younger. Under this provision, an employer can be more generous to older workers than to comparatively younger workers without violating the ADEA. By its plain terms, then, § 4(f)(2)(B)(i) confirms that the ADEA permits an employer to do precisely what General Dynamics did here.

Indeed, § 4(f)(2)(B)(i) immunizes the conduct at issue in this case wholly apart from whether "youth discrimination" claims might otherwise be brought under the ADEA by those forty or older, and therefore provides an independent reason for reversing the Sixth Circuit. Section 4(f)(2)(B)(i) provides that it "shall not be unlawful for an employer" to "take any action otherwise prohibited under subsection (a), (b), (c), or (e)" of the ADEA in order to "observe the terms of a bona fide employer benefit plan" where "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)." 29 U.S.C. § 623(f)(2)(B)(i).

It is clear from the face of respondents' complaint itself that the retiree health benefits General Dynamics offered its employees pursuant to CBA2 fulfill the requirements of § 4(f)(2)(B)(i).[15] It is undisputed that General Dynamics' retiree health insurance plan in CBA2 is a "bona fide employee benefit plan" under applicable law. *See* 29 C.F.R. § 1625.10(b) (defining such plans). It is equally undisputed that "the actual amount of payment made . . . on behalf of an older worker is no less than that made . . . on behalf of a younger worker." § 4(f)(2)(B)(i). The gravamen of respondents' case is, after all, that General Dynamics is spending *more* on retiree health benefits for those fifty and over than for the respondents (who are not eligible for such benefits at all). And it is beyond question that the retiree health insurance plan is consistent with § 1625.10 of title 29, Code of Federal Regulations, as in effect on June 22, 1989. In addition to requiring that a plan be a "bona fide employee benefit plan" and that the employer be observing the plan (both of which are clear here), § 1625.10 provides that the plan may not be a "subterfuge" to evade the purposes of the Act. The regulation defines a subterfuge as a plan that provides for lower benefits for older workers than for younger workers in situations where the employer has not shown that the lower benefits are justified by cost considerations. 29 C.F.R. § 1625.10(d). The benefits offered by General Dynamics in this case plainly are not a "subterfuge" within the meaning of that provision.

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[15] *See generally Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996) (holding that dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is "appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense"); *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (same).

Thus, even if the retiree health benefits offered by General Dynamics in this case were "otherwise prohibited" by the ADEA – and they clearly are not prohibited – § 4(f)(2)(B)(i) unambiguously authorizes General Dynamics to offer those benefits.

F. The EEOC Guideline Cited by the Sixth Circuit Provides No Basis for Interpreting the ADEA to Prohibit Providing Older Workers with Benefits Not Available to Younger Workers.

The Sixth Circuit's reading of § 4(a)(1) cannot be sustained on the basis of the EEOC guideline the decision cites. *See* Pet. App. 10a (citing 29 C.F.R. § 1625.2).

The guideline fairly read does not authorize challenges like the one here. In stating that an employer may not "discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over," 29 C.F.R. § 1625.2(a), the guideline merely sets forth the rule established by this Court in *O'Connor* – that is, the guideline authorizes older employees to sue on the basis of discrimination as compared to younger employees who are forty or older.[16] To read it otherwise would make the just

[16] The guideline goes on to state that "if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." 29 C.F.R. § 1625.2. That language is ambiguous, and can certainly be read to forbid considering the advanced age with respect to either employee as a negative factor, not to forbid preferring the older to the younger worker on the basis of his chronological age.

quoted paragraph (a) inconsistent with the regulation's paragraph (b), which permits extension of additional benefits to older workers within the forty and over class, as long as the additional benefits are to "counteract problems related to age discrimination." 29 C.F.R. § 1625.2(b). If "age discrimination" could run both ways, then no act taken to benefit anyone, older or younger, that was based on age could be justified as counteracting "age discrimination."

If, however, the guideline is read to express the view that the ADEA should apply in the present context, it should not be followed. The provision does not have the force of law. It is an "interpretative rule[] or statement[] of policy" issued to guide the EEOC's "performance of its administrative and enforcement duties under the Act." 46 Fed. Reg. 47724, 47724 (Sept. 29, 1981).[17] Such interpretative guidelines are not controlling, receive at most *Skidmore* deference, and are entitled to respect only to the extent they are persuasive. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); *United States v. Mead*, 533 U.S. 218, 228 (2001).

Here, the EEOC's guideline is not the least bit persuasive. To the contrary, as demonstrated *supra*, it is plain from the language, structure, and purpose of the statute itself, as well as the legislative history, that Congress sought to prohibit only discrimination based on old age. As the Seventh Circuit concluded after considering the regulation,

[17] The EEOC made a deliberate choice to place § 1625.2 in a subpart of the rules entitled "Interpretations," rather than in the "Substantive Regulations" subpart. *Compare* 29 C.F.R. § 1625 Subpart A *with* 29 C.F.R. § 1625 Subpart B.

"to the extent that regulation 1625.2 can be read to authorize reverse age discrimination suits, we think that it exceeds the scope of the statute." *Hamilton*, 966 F.2d at 1228.[18] Moreover, as will be demonstrated more fully *infra*, such a reading would be patently unreasonable because it would presumptively outlaw widely used and socially positive employment practices, in order to address a problem (employment discrimination against those forty and over on the ground that they are too young) that there is no reason to think exists. That is doubtless why, in the thirty-five year history of the ADEA, neither the EEOC nor the Department of Labor has ever enforced the provision judicially, notwithstanding the ubiquity of employment practices that would be inconsistent with the interpretation.

II. INTERPRETING THE ADEA TO AUTHORIZE SUITS BY YOUNGER WORKERS CHALLENGING PREFERENCES GIVEN TO OLDER WORKERS WOULD DEFEAT SETTLED EXPECTATIONS AND HAVE SEVERE PRACTICAL CONSEQUENCES.

Adopting the Sixth Circuit's novel and counterintuitive reading of the ADEA would also generate "serious practical problems" that provide a powerful additional reason for rejecting that interpretation. *See Dastar Corp.*, 123 S. Ct. at 2049.

Most importantly, the Sixth Circuit's endorsement of "youth discrimination" claims by those forty or older would

[18] Thus, the EEOC guideline would be invalid even under the standards of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

make presumptively unlawful employment practices that are virtually ubiquitous, and would deny employers the right to offer (and employees the right to seek through collective bargaining) socially positive benefit plans. Retiree health benefits of the kind at issue here illustrate the problem. One widely respected study demonstrates that in 2002 less than 1% of employers offering retiree health benefits to employees before they reach age sixty-five, and 3% of employers providing such benefits for employees 65 and older, based benefit eligibility on years of service alone. *See The Current State of Retiree Health Benefits: Findings From the Kaiser/Hewitt 2002 Retiree Health Survey*, 2, 4 (Dec. 2002), available at http://www.kff.org/content/2002/20021205a/. Another similar study demonstrates that 64% of employers with 1,000 or more employees maintained eligibility criteria for retiree health coverage that required employees both to be at least fifty years old and to have satisfied a years of service requirement. Paul Fronstein & Dallas Salisbury, *Retiree Health Benefits: Savings Needed to Fund Health Care in Retirement*, Employee Benefit Research Institute, Issue Brief No. 254, at 9 (Feb. 2003), *available at* http://www.ebri.org/pdfs/0203ib.pdf.

The reason for such age-based criteria is obvious. Retiree health insurance is extraordinarily expensive. If employers must offer equivalent benefits to all employees forty and older, many will decline to offer the benefit to anyone. Particularly in times of economic uncertainty, employers are faced with the need to scale back generous benefits programs; in many cases, the choice they face is between offering a retirement or other benefit only to some employees, or offering it to none. As the district court recognized, in this case General Dynamics lawfully could

have withdrawn the benefit from all its current employees. Pet. App. 24a. If employers were no longer permitted to offer more favorable benefits plans to older workers, the result might well be that no workers would receive benefits at the same level as older workers currently do. *See, e.g., Hamilton*, 966 F.2d at 1228 (refusing "to open the floodgates to attacks on every retirement plan"). This outcome would have the perverse effect of harming the very group of older workers whose employment opportunities the ADEA is designed to promote.

Additionally, there are often very good reasons for affording greater benefits to older workers. Many changes to employee benefit plans treat older workers more favorably to account for the fact that they will have fewer working years to recover from the change or to "grandfather" employees who are about to retire into benefits upon which they have relied. For example, an employer converting from a defined benefit plan to a defined contribution plan might allow workers close to retirement – whose benefits are about to come to fruition – to remain in the defined benefit plan. Such an action would be unlawful under respondents' view of the statute. Instead, employers would be required to treat all workers over forty identically, without regard for the "problems arising from the impact of age on employment." ADEA § 2(b), 29 U.S.C. § 621(b). *See, e.g., Karlen*, 837 F.2d at 318 (noting that if "workers 40 or older but younger than the age of eligibility for early retirement could complain . . . early retirement plans would effectively be outlawed, and that was not the intent of the framers of the Age Discrimination in Employment Act").

Holding that the ADEA forbids an employer from treating older workers more favorably than younger workers also would be inconsistent with many provisions of ERISA and the tax code. These statutes recognize that it is a salutary policy to provide benefits for older workers that are not available to younger workers. Indeed, in some circumstances, Congress has mandated preferential treatment for older workers. *See, e.g.*, 26 U.S.C. § 401(a)(28)(B)(iii) (providing that employee 55 or older must be allowed to diversify account under Employee Stock Ownership Plan, a benefit not extended to younger employees); 26 U.S.C. § 72(t)(2)(A)(i) (waiving 10% tax on early distributions from qualified retirement plans for workers who reach age 59½). Adoption of the Sixth Circuit's ruling would call these and similar provisions into doubt, and would, at a minimum, require courts to engage in the unwieldy task of reconciling these provisions with the contradictory prohibition against youth discrimination. At the very least, the fact that Congress has repeatedly *required* and even more frequently authorized, employment practices that grant preferential treatment to employees significantly older than forty and not to all employees forty or older provides a powerful caution against concluding that Congress in the ADEA intended to make such employment practices presumptively unlawful as a general matter.

More generally, construing the ADEA to authorize employees who are over forty to bring suit when they are treated less favorably than older employees would infuse a new across-the-board rigidity into employment decisions, and would prevent employers from accommodating the special needs of older workers. Because the ADEA applies to all incidents of the employment relationship, employers

seeking to fulfill the ADEA's stated purposes of "promot[ing] employment of older persons" and "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment," would be prevented from offering those older workers any preferential treatment or incentives. ADEA § 2(b), 29 U.S.C. § 621(b). For example, law enforcement agencies that maintain rigorous physical fitness requirements would likely be precluded from relaxing those standards for sixty-year-olds to facilitate their retention unless they did the same for forty-year-olds. *See, e.g.*, *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996) (describing U.S. Marshals Service's use of physical fitness component, with age-based sliding scale, in promotion decisions). Employers would either have to relax standards for all employees over forty or cease their efforts to promote the employment of older workers – thereby defeating the ADEA's express goal of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." ADEA § 2(b), 29 U.S.C. § 621(b). This Court should not be "disposed to give the statute a meaning that produces such strange consequences." *Deal*, 508 U.S. at 134.

Such a construction of the statute also would greatly increase the burdens associated with complying with the statute and would subject employers to a plethora of lawsuits. Whenever an employer were to take an employment action with respect to anyone forty or over, the employer would have to examine its action with respect not only to those who are older, but also to those who are younger. And any time someone forty or over were disfavored in any way, he would have a potential claim regardless of whether the preferred person were younger or

older. Because age, unlike race or sex, does not confer membership in a discrete, readily ascertainable category, any workforce of any size contains a "virtually infinite number of age subgroups," *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999), and thus any employment practice that disproportionately impacts some identifiable cohort of those forty or older might now be actionable – if not on an age discrimination theory, then on a reverse discrimination theory. Employers would be forced to ensure at least rough proportionality across every age cohort over forty, lest they disproportionately disfavor one subgroup and thereby subject themselves to potential liability and litigation expense limited only by the ingenuity of class action plaintiffs' lawyers.

The many deleterious consequences that would result from the Sixth Circuit's counterintuitive interpretation of the ADEA would be reason enough to reject "youth discrimination" claims under the ADEA even if some offsetting benefit could be achieved by recognizing such claims. But the Sixth Circuit has identified no such benefit, and none exists. There is no reason to think that employment discrimination against those forty and older on the ground that they are too young is a pervasive social problem warranting a sweeping regulatory response of the kind the Sixth Circuit's decision would impose – a response that would dramatically curtail employers' freedom of action and potentially deny millions of workers benefits they now have. Indeed, there is no reason to think – and certainly no evidence before Congress or this Court – that "youth discrimination" occurs with any frequency at all. Thus, there is no basis for concluding that Congress would have intended the ADEA to authorize workers forty or older to complain

that they have been treated unfavorably compared to older workers. A practical assessment of the ADEA's actual operation therefore powerfully reinforces the conclusion that the statute's text, structure and legislative history establish: the ADEA protects individuals from being discriminated against because they are too old, not because they are too young.

CONCLUSION

The decision of the Sixth Circuit should be reversed.

Respectfully submitted,

WILLIAM J. KILBERG
GIBSON, DUNN & CRUTCHER, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

CRAIG C. MARTIN
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

DONALD B. VERRILLI, JR.
Counsel of Record
DEANNE E. MAYNARD
JARED O. FREEDMAN
MARTINA E. VANDENBERG
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

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